

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WILLIAM POLK,

Defendant-Appellant.

UNPUBLISHED

March 6, 2003

No. 237824

Macomb Circuit Court

LC No. 01-001514

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, and resisting and obstructing a police officer, MCL 750.479, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution charged defendant with armed robbery on an aiding and abetting theory. At trial the evidence showed that two men robbed a convenience store and took money and cigarettes. The men wore dark shirts to partially obscure their faces, and one was armed with a handgun that he carried in his waistband. Defendant and Johnathan Breuer were apprehended in a vehicle in which the police found dark shirts, a handgun, and cigarettes of the brand taken from the store. Defendant and Breuer were arrested after a physical altercation with the police. Breuer's fingerprint was found on the cigarette carton. The store clerk viewed a photograph of the gun found in the vehicle and identified it as the gun the robber carried.

Defendant made a number of statements at the scene of his arrest and at the police station. After defendant was subdued he stated that he did it and that he knew he was going to return to jail. At the station defendant muttered that he should have robbed a bank. An investigating officer testified that defendant told him that he and Breuer were cousins. In response to a question as to whether defendant said anything else in connection with the investigation, the officer testified that he advised defendant of his *Miranda*¹ rights, and that defendant said that while he understood his rights he did not want to make a statement because he did not trust law enforcement officers and was not going to talk about the incident.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant moved for a mistrial on the ground that the prosecution's questions regarding whether he made a statement infringed on his right to remain silent. Following the jury's verdict the trial court denied defendant's motion, concluding that the prosecution did not deliberately attempt to elicit testimony that infringed on defendant's right to remain silent, and that any error was harmless in light of the overwhelming evidence against defendant.

The trial court sentenced defendant to serve concurrent terms of fourteen to thirty years in prison for armed robbery, and one year, four months' to two years' for resisting and obstructing a police officer. The minimum terms were within the applicable statutory sentencing guidelines.

When a defendant exercises his right to remain silent, that silence may not be used against him at trial. *People v Bobo*, 390 Mich 355, 360-361; 212 NW2d 190 (1973); *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). However, introduction of evidence that the defendant exercised his right to remain silent does not mandate reversal in all cases. Reversal may not be required if the prosecution did not make a deliberate attempt to place the defendant's silence before the jury. *People v Dennis*, 464 Mich 567, 575; 628 NW2d 502 (2001); *People v Truong (After Remand)*, 218 Mich App 325, 336-337; 553 NW2d 692 (1996).

The erroneous admission of evidence of a defendant's silence can be harmless error. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990). A nonstructural constitutional error does not require reversal if it was harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). The party who benefited from the error must demonstrate that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002). An error is not harmless if it is so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972).

We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *Dennis, supra*, 572.

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial on the ground that the prosecution improperly and deliberately referred to his right to remain silent. *Bobo, supra*. We disagree. Assuming, as the prosecution concedes, that the reference to defendant's exercise of his right to remain silent was improper, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial because the error was harmless beyond a reasonable doubt. The specific remark concerning defendant's exercise of his right to remain silent was made as part of a response to a question concerning investigative efforts.

We find no reason to disturb the trial court's conclusion that the reference to defendant's exercise of his right to remain silent was not deliberately injected into the trial, *Dennis, supra*, 575, and that it did not reveal any new information pertaining to defendant's guilt or innocence. *Taylor, supra*. Finally, we conclude that the evidence against defendant was overwhelming, and that it was clear beyond a reasonable doubt that the jury would have found defendant guilty absent the error. *Mass, supra*. When defendant and Breuer were apprehended they were found

in possession of dark shirts like those that covered the faces of the perpetrators, a handgun, and cigarettes of the brand stolen from the store. It is not reasonably possible that the isolated remark concerning defendant's exercise of his right to remain silent contributed to defendant's conviction. *Smith, supra*.

Defendant argues that the trial court incorrectly instructed the jury regarding the intent element of aiding and abetting. He contends that because armed robbery is a specific intent crime, the trial court was required to instruct the jury that in order to find that he aided and abetted the crime of armed robbery, he had to have had the specific intent that the crime of armed robbery be committed, or he had to have known that Breuer had the requisite specific intent. We disagree. Defendant's failure to object to the instructions warrants reversal only if plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Jury instructions must be read as a whole rather than extracted piecemeal to establish error. Even if instructions are somewhat imperfect, reversal is not required if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the crime charged. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The trial court's instructions included all of the elements of armed robbery, including specific intent, CJI2d 18.1; *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993), and all of the elements required to establish that defendant acted as an aider and abettor, CJI2d 8.1. The instructions informed the jury that in order to find defendant guilty of armed robbery on an aiding and abetting theory, it was required to find that he intended to commit the crime, i.e., he specifically intended to commit armed robbery, or that he knew that Breuer specifically intended to commit armed robbery. The instructions were a correct statement of the law, and did not permit the jury to convict defendant on a lesser standard of proof. *Aldrich, supra*. No plain error occurred. *Carines, supra*. Defense counsel did not render ineffective assistance by failing to object to the instructions. Counsel was not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra